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In the Supreme Court of the United States

OCTOBER TERM, 1989

DAVID LUCAS, et al.,
Appellants,

vs.

JUDY TOWNSEND, et al.,
Appellees.

On Appeal From The United States District Court For The Middle District of Georgia

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellees move that the final judgment of the District Court be affirmed on the grounds that the three-judge district court has correctly decided the matter and that the question presented is so unsubstantial as not to need further argument.

QUESTION PRESENTED

Whether the decision of the Bibb County Board of Education to submit a single twenty-nine million dollar bond referendum to the voters of Bibb County rather than to submit separate bond issues for four categories of school improvements is a voting qualification or prerequisite to voting, or standard practice or procedure with respect to voting within the scope of 42 U.S.C. § 1973c.

STATEMENT OF THE CASE

For over a year prior to December 17, 1987, the Bibb County Board of Education ("the school board") had planned to hold a referendum in May, 1989 to ask the voters of Bibb County to approve the issuance of general obligation bonds for the purpose of building a new high school, a new middle school, as well as to complete the air conditioning all the existing schools in the County. However, the Board deviated from this schedule

and on December 17, 1987 voted to separate air conditioning from the other projects and hold a referendum on the air conditioning question on March 8, 1988.

Setting the referendum on this date placed it on the same ballot as another referendum previously called by the City of Macon and Bibb County to raise the sales tax in Bibb County by 1% for capital improvements. The leaders of the city and county governments believed that raising the sales tax and voting on the bond referendum on the same ballot would weaken the support for both proposals and result in the failure of both. This belief was expressed to the members of the school board, many of whom also believed that this would create problems. Furthermore, there was a belief that the vote on the school bond proposal should be late in the school year when the weather in Middle Georgia is hot and the chance for passage of the referendum would be strongest. Finally, it was believed that the greatest support for the school improvement projects could

best be achieved by combining the various projects into one vote so that there would be something in the package which would benefit many different segments of the community.

At the next school board meeting, January 4, 1988, the school bond referendum was postponed until May 31, 1988. The air conditioning issue was also recombined with the new school projects.

A submission was filed with the Attorney General under Section 5 of the Voting Rights Act seeking preclearance for the May 31 election. On May 25, 1988 the Justice Department informed the Board by telephone that it could not preclear the holding of the referendum without further information and indicated that a letter requesting this information would be forthcoming. Because the election was only six days away, a decision needed to be reached as to how to proceed. However, before the school board could schedule a meeting with the county commissioners, this action was filed in the district court on

May 27.

A three-judge court determined, after a hearing, that preclearance was not required. The plaintiffs appealed to this court and requested an injunction pending appeal. Justice Kennedy, as the Circuit Justice for the Eleventh Circuit, issued the requested injunction to enjoin the holding of the election until this Court could hear the question of whether the setting of the date of the bond issue referendum is a covered change under Section 5.

However, because of state law notice requirements for holding a bond referendum, the postponement which resulted from the injunction rendered that effort moot. The issue to be presented to this Court was likewise moot, and that appeal was dismissed.

On June 9, 1988 the school board approved a new bond referendum for $29,000,000.00. This proposal included the air conditioning projects, the new school proposals, and, additionally, funding for a magnet school program at Northeast High School.

The new referendum was scheduled for November 8, 1988, the date of the general election in 1988, and the date scheduled for the election of the President of the United States.

On July 27, 1988, the new bond issue referendum was submitted to the Attorney General for preclearance. It requested the Attorney General to consider "the call of a bond referendum on the issue of whether general obligation bonds in the amount of $29,000,000.00 should be issued by Bibb County, Georgia . . ." It referred the Attorney General to the previous submission wherein the Attorney General had requested additional information and requested the board to respond to allegations that combining the projects was an attempt to manipulate the black vote. Although a section of the new submission stated that "the only 'change' involved in this proceeding, *as defined in the regulations of the Attorney General* (emphasis added) has to do with the discretionary setting of the date for a bond referendum," the Board did not limit the submission to the date,

but presented any and all questions effecting the referendum for consideration.

Several witnesses testified by declaration, that during the Attorney General's review of this matter, they discussed not only the date of the election, but also the question of whether the form of the bond referendum was discriminatory with Ms. Hallue Wright, an employee in the Voting Section of the Civil Rights Division. They further testified that she brought the point into their conversations. At no time did the Justice Department indicate that it was not considering the point.

On September 26, 1988, the Attorney General specifically precleared the election date. No mention was made in his letter as to the form of the question to be submitted to the electorate. The sixty day period for objection by the Attorney General passed and no objection was made.

In October, 1988, appellants filed a second motion for injunctive relief in the district court claiming that neither the

date of the election, nor the form of the question had been precleared. A three-judge district court was convened. The Attorney General entered the case as amicus curiae and supported the school board, noting that the date of the special election had already been precleared, and taking the position that the decision as to how to frame the bond referendum question was not subject to preclearance under Section 5.

The three judge court denied appellants motion for preliminary injunction, substantially adopting the Attorney General's position. No appeal of that order was taken by appellants and the election was held. The bond issue was approved by the voters of Bibb County 21,915 votes for (51%) and 21,287 votes against (49%). Interestingly, the vote was split on lines identical to the percentage of families in Bibb County with school age children.[1]

An analysis by appellants' expert of voting patterns in Bibb

[1]1980 Census.

County, Georgia showed that voting, at least on referenda is not racially polarized. A majority of both blacks and whites voted against the City/County sales tax referendum which was held in March, 1988. The election results for the bond referendum involved in this litigation show that substantial minorities of whites (43%) and blacks (44%) voted opposite to what appellants assert to be the "white" and "black" positions in this case. Appellants' expert's multiple regression analysis established that race was not a good indicator for why people voted for or against the school bonds and that there were other factors involved in the outcome which he could not explain.

On March 7, 1989, the three-judge district court granted final judgment on the Section 5 claim in this case to appellees on the same basis as that for denying the preliminary injunction in November. A motion for new trial was made and denied, and an appeal was taken.

ARGUMENT AND CITATION OF AUTHORITY

I.

THE FORM OF THE REFERENDUM QUESTION ON THE BALLOT IS NOT A VOTING QUALIFICATION, PREREQUISITE TO VOTING OR STANDARD PRACTICE OR PROCEDURE WITH RESPECT TO VOTING.

42 U.S.C. § 1973c requires preclearance whenever a covered jurisdiction subject to its provisions "shall enact or seen to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" different from that in force or effect on November 1, 1964. The issue for this Court is whether the decision to submit a single referendum to the voters of Bibb County related to school improvement projects rather than to submit separate referenda on air conditioning, a high school, a middle school and a magnet school is "a voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting."

Preclearance is required of: (a) voting qualifications; (b)

prerequisites to voting; or (c) standards, practices, or procedures with respect to voting. All are related to "voting". "Voting" as defined in the Act means

> all action necessary to make a vote effective . . . including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with *respect to candidates for public or party office and propositions for which votes are received in an election.*

42 U.S.C. § 1973 (c)(1). (Emphasis added). By definition the structure of the question to be submitted for voting is outside the scope of the Act. As the emphasized portion of the definition indicates, the Act presupposes that there is a candidate or proposition to be submitted to the electorate and gives no indication that the Justice Department is to review candidates or propositions for their effect on voting. Since the statute implicitly expresses Congress' decision not to cover the present situation, the case should be affirmed.

The most closely analogous situation in the Justice Department regulations is the provision dealing with political parties' activities which are subject to preclearance, 28 C.F.R. § 51.7. That regulation states that the drafting of party platforms are not subject to preclearance. Like the Board's decision in this case on how to frame the referendum question, political parties formulate a platform that combines various ideas and proposals for governing this country. Obviously, some of these proposals such as affirmative action, are perceived to be racially divisive. The political parties intentionally take positions on these issues designed to persuade a sufficient number of voters to support their candidates to result in the election of their candidates. These positions are taken with the knowledge that the position taken will supposedly draw black or white support for the political party.

While we do not believe appellants would claim that party platforms or the background and life history of a candidate for

public office, are subject to scrutiny by the Attorney General for their discriminatory effect, logically, there is no difference between: (1) formulating a party platform to achieve the greatest support; (2) choosing a candidate with the broadest voter appeal; and (3) forming a bond referendum question to get the most support from the community.

The Attorney General's example of changes, 28 C.F.R. § 51.13, also indicates that what is at issue in this case is not subject to preclearance. "Changes affecting voting include, but are not limited to the following examples: . . . (j) Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum."

The form of the proposition submitted on the ballot has nothing to do with the necessity of or method for offering a bond referendum. The Georgia Constitution and statutes, as construed by our courts, give the broadest possible discretion to the board of education with regard to the control and management of the

school district. If a school board determines that bond financing is necessary or appropriate for a capital improvements project, it petitions the board of commissioners to call a bond election. The broad discretion given to boards of education in Georgia over the management and control of school affairs has existed since at least the Constitution of 1877. The wisdom of using this discretion to obtain bond financing has existed ever since Georgia has had a bond law. All of this long predates the adoption of the Voting Rights Act. Therefore, there has been no change with regard to "the necessity of offering issues and propositions for approval by referendum."

The method for offering and calling a bond election in Georgia, OFFICIAL CODE OF GA. ANN. § 20-2-430, § 21-2-540, and §§36-82-1 and 36-82-2 either predates the Voting Rights Act or has been previously precleared. There is no change here.

"It tortures the language of the [Voting Rights] Act to conclude that [the form of the question submitted for

referendum], having nothing to do with the conduct of elections as such, is state action with respect to voting. No one is denied the right to vote; nor is anyone's exercise of the franchise impaired." *Dougherty County Board of Education v. White*, 439 U.S. 32, 51 (1978) (Powell J., dissenting) (material in brackets substituted for original language). The interpretation asserted by appellants in this action likewise distorts the language of the act and, is contrary to the Attorney General's regulations. It would prevent compromise and consensus building and grind government in covered jurisdictions to a halt. That view should be summarily rejected.

II.

THE ATTORNEY GENERAL HAS DETERMINED THAT THE SCHOOL BOARD'S DECISION ON HOW TO FORMULATE THE REFERENDUM QUESTION IS NOT SUBJECT TO PRECLEARANCE AND HIS OPINION IS ENTITLED TO GREAT DEFERENCE.

Throughout the history of Voting Rights Act litigation, this Court has given great weight to the decision of the Attorney General on the scope of the Act, *N.A.A.C.P. v. Hampton County*

Election Commission, 470 U.S. 166, 178-179 n.29 (1985); *United States v. Sheffield Board of Commissioners*, 435 U.S. 100, 131, (1978). (Deference should be accorded the Attorney General's construction of the Act, especially in light of the extensive role played by the Attorney General in drafting the statute and explaining its operation to Congress); *Dougherty County Board of Education v. White*, 439 U.S. 32, 39 (1978).

The Attorney General expressed his views on the question in this case in his amicus brief filed in the District Court.

> [T]he facts of record would tend to suggest that the defendant's discretionary decision to present the voters with a single vote on the entire bond project is not the kind of change subject to preclearance. Selecting a number of projects to be financed under one bonding authority would seem to be a normal legislative decision unrelated to the process of holding elections. It is essentially the same kind of determination as the amount of bonded indebtedness required for a project, the interest rate the Board is willing to pay or the term of the bonds.

Brief For The United States As Amicus Curiae, at 16-17. This action should be summarily affirmed because the Attorney

General has interpreted the Act properly, his decision is entitled to great deference, and delay only harms the children of Bibb County.

III.

THE FORM OF THE REFERENDUM QUESTION WAS SUBMITTED TO AND CONSIDERED BY THE ATTORNEY GENERAL. HE DID NOT INTERPOSE AN OBJECTION TO THE QUESTION.

The preclearance request for the proposed May 31 election was not ruled upon by the Attorney General. Rather, on May 25, the Board was asked to provide a rather large amount of additional information and to address two questions: the choice of the date and allegations that the county was trying to manipulate the black vote by combining each project to be constructed into one question on the ballot.[2] Because of the timing of this request, it was impossible to comply with it before subsequent events made the first preclearance request moot. However, when putting together the information for the second

[2]Letter from William Bradford Reynolds dated May 25, 1988 attached to the Stipulation as Exhibit #1.

preclearance request, the Board determined that it would fully comply with the Attorney General's regulation regarding the contents of a § 5 submission and that to the extent possible, it would furnish all of the information specifically requested relative to the first submission and the questions posed in the request.

A complete copy of this Submission and all documents attached to it is in the record. The Submission was structured so as to provide a response to each subparagraph of § 51.27, *Required contents*. Subparagraph (a) requests a copy of the ordinance, enactment, order, or document embodying a change affecting voting. In attempting to respond to this paragraph in terms of how a bond election is called, the Board set forth the procedures and referred to all of the documents relating thereto. In so doing, the question of the form of the referendum and the allegations of manipulating the back vote was specifically addressed:

> The Superintendent's recommendation proposed that the Board again submit to the County Commission (See (o), infra) a request for a bond issue in the amount of $28,000,000 for air conditioning and a new high school and middle school. *He strongly recommended that all the projects be combined in one issue to be presented to the voters. His reasoning for this position is specifically set forth in his recommendation.*

(emphasis added)

The Attorney General is supposed to evaluate a change in terms of its purpose or affect on voting by covered minority groups. The Superintendent's recommendation fully covers the purpose of combining all of the projects in one vote and directly addressed the claim that this is an attempt to manipulate the black vote, i.e., its effect.[3] The submission then goes on to

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[3]The allegation has been made to the Justice Department that combining the air conditioning with the new schools has some kind of racial overtones because air conditioning "apparently is favored by the black constituency" while a new high school "is generally opposed by the black constituency." This is simply not true. The new high school is projected to have a 53% black student body based on the racial ratios in ifs feeder schools. Black leaders in the community have been active and outspoken in support of the combined bond issue. Mr. William P. Randall serves as a co-chairman of the steering committee. Mr. Harris Walker has published an editorial in the Macon Courier supporting the bond issue. Many of our black principals, teachers and staff have worked

incorporate the formal bond resolution adopted by the board of commissioners which contains the exact language to appear on the ballot as the form of the question. The form of the question to be submitted in this referendum was obvious on the face of the resolution scheduling the bond issue.

The school board's submission attempted to further make it clear that there was no "change" involved in this bond election by referring to § 51.17, *Special elections*, and making two observations about it: (1) the regulation states that setting the date is a change; but (2) it does not extend the definition of a "change affecting voting" to include the matter of the form of the question. There is nothing in the submission which can reasonably be construed to mean that the school board was not

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long and hard for the bond issue. On the other hand, there are other persons who happen to be black, such as Mr. Brown [a board member], who opposed the fifth high school and have worked against the bond issue. However, the fact that persons in the community who are black may be divided in their views on this issue does not translate into anything "apparent" or "in general" about the black community, and it certainly does not mean that combining this vote is an attempt to manipulate black voters.

seeking preclearance of every issue which had been raised about the bond election.

The information provided to the Attorney General thoroughly discusses the proposal for a fifth high school and its racial composition.[4] The only conceivable reason the Attorney General could have had in asking for the information in the May 25 letter would be to assess whether the proscribed adverse effect on black voting would exist by having one vote on all the projects. It was presented to him in a submission which directly addresses this question.

The form of the question issue was actually considered by the Attorney General. As set forth in the declarations of Willie H. Odom, William P. Randall, and W. Warren Plowden, Jr., each of these individuals discussed the Section 5 Submission with Mrs. Hallue Wright, the employee in the Voting Section of the Civil

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[4]Based on the population of the proposed feeder schools for the fifth high school, the racial composition of its student body would be 53% black and 47% white.

Rights Division who made the initial review and recommendation. In each instance, Mrs. Wright raised the form of the question issue in the course of the telephone conversations.

The Attorney General's response specifically stated that he does not interpose any objection to the date which was chosen for the election. It made no attempt to reserve the right to object to other features of the call for the bond issue and it is silent and makes no reference at all to the form of the question to be put to the voters. His failure to interpose an objection within 60 days is the end of the Section 5 claim.

The facts of this case are analogous to the situation which existed in *Woods v. Hamilton*, 473 F. Supp. 641 (D.S.C., 1979). The 1975 Home Rule Act in South Carolina had three main features. It authorized a permissive referendum in each county to determine a form of local government to be chosen from five specified forms. Regardless of the form chosen, the Act transferred substantial governmental power to each local

government which it did not have previously. Finally, it mandated a particular form of government for those counties which did not make a choice in a referendum.

The entire Act was submitted under Section 5 by the South Carolina Attorney General. In his response, the United States Attorney General specifically did not interpose an objection to having a referendum in each county. He attempted to reserve the right to object to the implementation of the form of government which might be chosen by a particular county. His letter did not mention the transfer of powers. Relying on *Morris v. Gressette*, 432 U.S. 491 (1977) and *United States v. Georgia*, C.A. No. 76-1531A (N.D.Ga. 1977), *aff'd.* 436 U.S. 931 (1978), the three-judge district court in South Carolina held that the transfer of powers issue had in fact been precleared:

> Whatever may have been the motive of the Attorney General in failing to object to the transfer of powers in his August 28, 1975 letter, the fact remains that the State submitted the entire Home Rule Act and, under the law, the Attorney General of the United States was

> required to pass on all components of a complete submission at that time (i.e., at the least, those steps in the submission certain to occur without further action, or requiring only further ministerial action on the part of the state political entity).

473 F. Supp. at 646. The Attorney General has the duty under the Act to object to any change which does not measure up under the substantive legal standard. Indeed, he is specifically authorized to seek preventive relief against the enforcement of any change which has not been precleared. 42 U.S.C. § 1973d(j). All components of the bond election were before him. Nothing remained except those steps requiring only further ministerial action by the election officials. His failure to object to any component which was before him preclears the change by operation of law.

CONCLUSION

The form of the question posed on the ballot with respect to whether or not the voters will approve financing public school improvements through the issuance of general obligation bonds is not a voting qualification, prerequisite to voting, or standard, practice or procedure with respect to voting. The plain language of the Act, the Attorney General's regulations interpreting the Act, and the position adopted by him in this litigation fully support this result. We respectfully request summary affirmance.

Respectfully submitted,

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